No. 15-6418

In the

Supreme Court of the United States

GREGORY WELCH,

Petitioner,

v.

UNITED STATES,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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BRIEF OF SCHOLARS OF FEDERAL COURTS AND SENTENCING AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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SUMMARY OF ARGUMENT

Prior to the Court's decision in *Johnson v. United States*[2] prisoners whose sentences depended on the "residual clause" of the Armed Career Criminal Act ("ACCA"), 18 U.S.C. § 924(e), were subjected to a mandatory *minimum* term of imprisonment of 15 years. Under *Johnson*, the lawful statutory *maximum* sentence for their offense is 10 years. *Johnson* thus fundamentally altered both the punishment applicable to a class of defendants—defendants whose sentences depended on ACCA's residual clause—and the elements of a criminal offense.

Under *Teague v. Lane*[3] and its progeny, the rule announced in *Johnson* applies retroactively. *Teague*'s intellectual underpinnings confirm as much. *Teague* explicitly adopted Justice Harlan's framework for determining whether new constitutional rules apply retroactively. *See Teague*, 489 U.S. at 292 ("[W]e adopt Justice Harlan's approach to retroactivity for cases on collateral review."). And the Court has continued to look to Justice Harlan's writings for guidance in cases regarding the retroactive application of new constitutional rules. *See, e.g.*, *Montgomery v. Louisiana*, __ U.S. __, 136 S. Ct. 718, 729 (2016) (invoking Justice Harlan's writings on retroactivity); *id.* at 735 (same); *id.* at 742 (Scalia, J., dissenting) (same). A fuller analysis of Justice Harlan's writings on retroactivity thus provides some direction on the kinds of rules that should apply retroactively under *Teague*. And that analysis reveals that Justice Harlan maintained that a constitutional decision facially invalidating a criminal statute—such as *Johnson*—was a "clear" instance where finality interests would yield and the new decision would apply retroactively. *Mackey v.*

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[2] 135 S. Ct. 2551 (2015).

[3] 489 U.S. 288 (1989).

United States, 401 U.S. 667, 692-93 (1971) (Harlan, J., dissenting).

Teague and subsequent cases later generalized Justice Harlan's exception to mean that new constitutional rules apply retroactively where they are substantive. The Court has since clarified that substantive rules include rules that alter the "punishment that the law can[] impose upon" a prisoner, as well as rules that "modif[y] the elements of an offense." *Schriro v. Summerlin*, 542 U.S. 348, 352, 354 (2004). *Johnson* does both. Further, retroactivity doctrine has also always been attuned to "equitable and prudential considerations," *Danforth v. Minnesota*, 552 U.S. 264, 278 & n.15 (2008), such as the real-world effects of mandatory minimums, which mechanically result in additional lengthy terms of imprisonment. And declining to apply *Johnson* retroactively would deny prisoners a remedy for the substantial deprivation of liberty that resulted from the misapplication of a mandatory minimum sentence that exceeds the lawful statutory maximum established by Congress. It would also undermine the principle that criminal punishments are established by the legislature, and not the judiciary. *See Whalen v. United States*, 445 U.S. 684, 689 (1980) ("[T]he power to prescribe the punishments to be imposed upon those found guilty resides wholly with the Congress.").

Petitioner may also be entitled to the benefit of the new rule announced in *Johnson* because *Teague*'s retroactivity bar should not even apply to collateral challenges to federal sentences. *Teague* established a general bar against federal courts retroactively applying new constitutional rules against States in order to accommodate the "interests of comity and finality." 489 U.S. at 308. These considerations, which must "be considered in determining the proper scope of habeas review," *id.*, arguably do not justify applying a bar against retroactive application of new

constitutional rules in collateral challenges to federal sentences. Collateral challenges to federal, as opposed to state, judgments do not implicate comity and federalism, and finality is much less of a concern where a prisoner challenges a sentence, rather than a conviction.

Each of these reasons independently suffices to reverse the court of appeals decision denying a certificate of appealability in this case. If *Teague*'s retroactivity bar applies to collateral challenges to federal sentences, then the rule announced in *Johnson* applies retroactively under *Teague* (either because it qualifies as an "exception" to *Teague*'s retroactivity bar, or because it was not subject to the bar in the first place).[4] If *Teague*'s bar against retroactive application of new constitutional rules does not apply to collateral challenges to federal sentences, however, then Petitioner is entitled to the benefit of the new rule announced in *Johnson*.

The Court need not decide the second question—whether *Teague*'s retroactivity bar applies to collateral challenges to federal sentences—until the issue is fully briefed in a future case. The looming statute of limitations makes it unrealistic to ask for additional briefing and thus allow for full consideration of this question. Prisoners have one year from the date on which *Johnson* was decided (June 26, 2015) to file a successive petition for post-conviction review. 28 U.S.C. § 2244(d)(1) (2012); § 2255(f)(3). The Court therefore must apply *Johnson* to a case on collateral review before the end of this Term in order to ensure that

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[4] *Cf. Montgomery v. Louisiana*, __ U.S. __, 136 S. Ct. 718, 728 (2016) ("Although *Teague* describes new substantive rules as an exception to the bar on retroactive application of procedural rules, this Court has recognized that substantive rules 'are more accurately characterized as ... not subject to the bar.'" (quoting *Schriro v. Summerlin*, 542 U.S. 348, 352 n.4 (2004)).

successive petitions are not time-barred. *See Dodd v. United States*, 545 U.S. 353, 359 (2005) ("[A]n applicant who files a second or successive motion seeking to take advantage of a new rule of constitutional law will be time barred except in the rare case in which th[e] Court announces a new rule of constitutional law and makes it retroactive within one year."). Because the rule announced in *Johnson* applies retroactively under *Teague*, the Court may rule for Petitioner while assuming, without deciding, that *Teague* applies to collateral challenges to federal sentences.[5]

Finally, applying *Johnson* to cases on collateral review would not unduly burden the federal courts. District courts have processed and modified the sentences of tens of thousands of offenders under 2007 and 2010 retroactive amendments to the federal sentencing guidelines.[6] Significantly fewer prisoners were sentenced under ACCA's residual clause. Many of these prisoners also will not require full resentencings, and the resentencings that have occurred to date confirm that the process will be both swift and seamless. The relevant fact-finding—the defendant's criminal history—has usually been conducted, and official and readily accessible documents will indicate both a defendant's offense of conviction as well as any applicable mandatory minimums.

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[5] *Cf. e.g.*, *Chaidez v. United States*, __ U.S. __, 133 S. Ct. 1103, 1113 n.16 (2013) (noting without deciding question).

[6] *See infra* Part III.

ARGUMENT

I. *TEAGUE*'S ORIGINS AND SUBSEQUENT APPLICATIONS CONFIRM THAT *JOHNSON* APPLIES RETROACTIVELY

The Court has repeatedly confirmed that Justice Harlan's writings form the underpinnings of *Teague*. *See, e.g.*, *Montgomery v. Louisiana*, __ U.S. __, 136 S. Ct. 718, 729 (2016); *Teague*, 489 U.S. at 292 ("[W]e adopt Justice Harlan's approach to retroactivity for cases on collateral review."). The Court has accordingly looked to Justice Harlan's writings for guidance as it has defined the contours of retroactivity doctrine. *See, e.g.*, *Montgomery*, 136 S. Ct. at 732 (citing Justice Harlan for the proposition that "the retroactive application of substantive rules does not implicate a State's interests in finality" (citing *Mackey v. United States*, 401 U.S. 667, 693 (1971) (Harlan, J., dissenting)); *id.* at 735 (citing Justice Harlan for the proposition that "[s]ome rules may have both procedural and substantive ramifications" (quoting *Mackey*, 401 U.S. at 692 n.1 (Harlan, J., dissenting)); *id.* at 742 (Scalia, J., dissenting) (relying on "*Teague*'s first exception ... as initially conceived by Justice Harlan"). Because *Teague* adopted Justice Harlan's framework for retroactivity, an analysis of Justice Harlan's writings on retroactivity provides some evidence about the kinds of rules that apply retroactively under *Teague*, including the rule at issue in this case, *Johnson*. Justice Harlan envisioned that a rule like *Johnson*, which invalidated a criminal statute on federal constitutional grounds, would apply retroactively.

Moreover, in subsequent decisions applying *Teague*, the Court has clarified that new "substantive" rules are not subject to *Teague*'s retroactivity bar.[7] The rule announced in

[7] *Schriro*, 542 U.S. at 351.

Johnson has all of the hallmarks of a substantive rule that the Court has identified: It altered the lawful statutory sentencing range for a crime, thus changing the "punishment that the law can[] impose upon" a prisoner,[8] and it changed an "element of a[] [criminal] offense"—the conditions under which a defendant may be subjected to a mandatory minimum sentence.[9] *See generally* Leah M. Litman, *Residual Impact: Resentencing Implications Of* Johnson's *Potential Ruling On ACCA's Constitutionality*, 115 Colum. L. Rev Sidebar 55, 60-63, 65-73 (2015); Leah M. Litman, *Resentencing In The Shadow Of* Johnson v. United States, 28 Fed. Sen'g Rep. 45, 47-49 (2015).

Finally, the result of the decision in *Johnson* is that some prisoners are serving sentences that exceed the lawful statutory maximum for their offense. It would offend fundamental notions of fairness to decline to apply such a rule retroactively. Applying *Johnson* retroactively would ensure that prisoners have a remedy for a substantial deprivation of liberty—a mandatory additional term of imprisonment of 5 years. Doing so would also recognize the real-world and substantive effects that mandatory minimums have. And applying *Johnson* retroactively would respect the basic principle that criminal punishments are established by the legislature, not the judiciary. Accordingly, the Court should hold that the rule announced in *Johnson*—that ACCA's residual clause is unconstitutional—applies retroactively under *Teague*.

A. Justice Harlan Maintained That Decisions Invalidating Criminal Statutes Would Apply Retroactively

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[8] *Id.* at 352.

[9] *Id.* at 354.

Justice Harlan's writings on retroactivity, which the Court adopted in *Teague*, envisioned that constitutional rules invalidating criminal statutes would apply retroactively. Justice Harlan maintained that post-conviction review "has historically been available for attacking convictions" based on "[n]ew 'substantive" rules.[10] And Justice Harlan defined substantive rules as decisions regarding "the constitutionality of the federal or state statute under which [a defendant] had been convicted,"[11] including rules "that place, as a matter of constitutional interpretation, certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe."[12] The Court has already recognized that Justice Harlan's retroactivity exception for substantive rules "cover[s] not only rules forbidding criminal punishment of certain criminal conduct" "but also rules prohibiting a certain category of punishment."[13] Justice Harlan's exception for substantive rules includes ***all*** rules invalidating criminal statutes, not merely those declaring that Congress may not prohibit certain conduct. And because *Johnson* declared unconstitutional a criminal statute, it is precisely the type of rule that Justice Harlan believed should be retroactive.

Justice Harlan explicitly incorporated into his definition of "substantive rules" the discussion in an article by Professor Anthony Amsterdam, which maintained that "[a] claim that the movant pleaded guilty to a crime under a statute unconstitutional 'on its face' offends none of the

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[10] *Mackey* 401 U.S. at 692-93 (Harlan, J., dissenting).

[11] *Id.* at 684 (internal citations and quotations omitted); *see Desist v. United States*, 394 U.S. 244, 261 n.2 (1969) (Harlan, J., dissenting).

[12] *Mackey*, 401 U.S. at 692 (Harlan, J., dissenting).

[13] *Montgomery v. Louisiana*, __ U.S. __, 136 S. Ct. 718, 729 (2016) (internal citations and quotations omitted).

finality elements significantly."[14] Professor Amsterdam also showed that "the Supreme Court has consistently entertained federal prisoners' collateral challenges to the 'fac[ial]' constitutionality of the underlying criminal statute."[15] The cases cited by Professor Amsterdam were not exclusively concerned with claims that Congress lacked the constitutional power to prohibit or penalize certain conduct.[16] For example, Professor Amsterdam listed *In re Gregory*, 219 U.S. 210, 214 (1911), a case which involved a due process challenge that certain statutory terms were "so uncertain to make the [statute] nugatory,"[17] as the kind of claim that, when raised in a collateral challenge, did not implicate interests in finality.[18] Professor Amsterdam also identified other due process challenges as the kinds of claims that did not implicate interests in finality.[19] And Justice Harlan agreed with Professor Amsterdam's assessment. After citing Professor Amsterdam's article, Justice Harlan stated that "such" claims—facial challenges to criminal statutes—"represent[] the clearest instance where finality interests should yield."[20]

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[14] Anthony Amsterdam, *Search, Seizure, and Section 2255: A Comment*, 112 U. Penn. L. Rev. 378, 384 (1964).

[15] *Id.* at 384 n.30.

[16] Cases Professor Amsterdam listed include *The Ku Klux Cases*, 110 U.S. 651, 654 (1884) (constitutional challenge to criminal statute); *Ex parte Curtis*, 106 U.S. 371 (1882) (same); and *Ex parte Siebold*, 100 U.S. 371, 374 (1879). *See* Amsterdam, *supra*, at 384 n.30.

[17] 219 U.S. 210, 214 (1911).

[18] Amsterdam, *supra*, at 384 n.30.

[19] *Id.* (citing *Baender v. Barnett*, 255 U.S. 224, 225 (1921), which rejected a due-process challenge by interpreting the statute to prohibit only "willing and conscious possession").

[20] *Mackey*, 401 U.S. at 692-93 (Harlan, J., dissenting).

The Court has also rejected the notion that substantive rules are limited to rules holding that the Constitution forbids Congress from criminalizing certain conduct or from prescribing certain punishments. For example, *Bousley v. United States*, 523 U.S. 614 (1998), held that a decision which narrowed the scope of 18 U.S.C. § 924(c)(1), so that it did not prohibit certain kinds of firearm possession, was substantive and retroactive.[21] Congress could have later amended the statute to prohibit those forms of possession, and it did in fact do so.[22]

The rule announced in *Johnson* is no less substantive because it involves a mandatory minimum sentence. The writ of habeas corpus has traditionally been available where a prisoner's sentence is unlawful, even if the underlying conviction is not. *See In re Medley*, 134 U.S. 160, 171 (1890) (granting writ of habeas corpus where sentence to solitary confinement violated ex post facto clause); *In re Bonner*, 151 U.S. 242 (1894) (granting writ of habeas corpus where prisoner was unlawfully sentenced to serve time in state penitentiary); *cf. Montgomery*, __ U.S. __, 136 S. Ct. at 731 (explaining that "the same [retroactivity] logic governs a challenge to a punishment," such as where "the sentence was one the court could not lawfully impose" (internal citations and quotations omitted)). Nor is *Johnson* any less substantive because it held ACCA's residual clause unconstitutional, rather than interpreting its terms.[23] Whether the Court has

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[21] 523 U.S. 614, 620-21 (1998) (applying *Bailey v. United States*, 516 U.S. 137 (1995) retroactively).

[22] *United States v. O'Brien*, 560 U.S. 218, 233 (2010) (noting congressional amendment "was colloquially known as the 'Bailey Fix Act'").

[23] *See* Litman, *Resentencing In The Shadow*, *supra*, at 47; Leah Litman, *What Does* Montgomery v. Louisiana *Mean For Johnson Retroactivity?*, Casetext (Jan. 27, 2016), https://casetext.com/posts/what-does-montgomery-v-louisiana-

interpreted ACCA's terms or held them unconstitutional, the resulting decision will "*necessarily* carry a significant risk" that a particular class of defendants has received unlawful sentences. *Schriro*, 542 U.S. at 352 (emphasis added). That is the defining characteristic of a substantive rule.[24]

Johnson therefore announced precisely the kind of rule that Justice Harlan maintained would be retroactive: a decision invalidating a statute on due process—and specifically vagueness—grounds. *Johnson* held that ACCA's residual clause was "unconstitutional 'on its face.'"[25]

B. Johnson *Applies Retroactively Because It Altered What Punishment The Law May Impose and The Elements of A Criminal Offense*

The Court's subsequent retroactivity cases, which have built on Justice Harlan's framework, further establish why the rule announced in *Johnson* applies retroactively. The Court has made clear that rules either changing the "punishment that the law can[] impose upon" a defendant or altering an "element of a[] [criminal] offense" are substantive and therefore retroactive. *Schriro*, 542 U.S. at 352, 354. *Johnson* did both.

First, *Johnson* altered the punishment that the law can impose on defendants whose ACCA sentences depended on

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mean-for-johnson-retroactivity ("[I]t strains imagination to think that a rule is less 'substantive' if it holds that a statute is facially unconstitutional rather than interpreting the statute's terms. The effect of both kinds of rules is the same.").

[24] *See Schriro*, 542 U.S. at 352 (listing rules in this category).

[25] Amsterdam, *supra*, at 384 n.30; *see Johnson v. United States*, 135 S. Ct. 2551, 2563 (2015) ("[A]n increased sentence under the residual clause of the Armed Career Criminal Act violates the Constitution's guarantee of due process.").

the residual clause. The decision reduced these defendants' statutory *maximum* term of imprisonment to 10 years, when previously they were subject to a statutory *minimum* term of 15 years. *Compare* 18 U.S.C. § 924(e), *with* 18 U.S.C. § 924(a)(2). Johnson thus changed the statutory sentencing range for a class of defendants, resulting in some prisoners facing "'a punishment that the law cannot impose upon' them—a term of years exceeding the statutory maximum for the offense they were convicted of."[26] A rule is substantive when it "prohibit[s] a certain category of punishment for a class of defendants because of their status or offense." *Penry v. Lynaugh*, 492 U.S. 302, 330 (1989), abrogated on other grounds, *Atkins v. Virginia*, 536 U.S. 304 (2002). *Johnson* did just that for defendants whose sentences depended on ACCA's residual clause.

Second, by invalidating the residual clause, *Johnson* changed the elements of a criminal offense—the conditions that subject a defendant to ACCA's 15-year mandatory minimum sentence. The Court has said repeatedly that "any fact that increases the mandatory minimum" sentence is an "element" of a criminal offense.[27] Before *Johnson*, prisoners with three or more convictions for felonies that were found to "otherwise involve conduct that presents a serious potential risk of physical injury to another" were subjected to ACCA's 15-year mandatory minimum sentence.[28] After *Johnson* they are not.[29] And because the residual clause "restricted the

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[26] Litman, *Residual Impact*, *supra*, at 61 (quoting *Schriro*, 542 U.S. at 352).

[27] *Alleyne v. United States*, 133 S. Ct. 2151, 2155 (2013); *see Hurst v. Florida*, __ U.S. __, 136 S. Ct. 616, 621 (2016).

[28] 18 U.S.C. § 924(e)(2)(B)(ii).

[29] *See* 135 S. Ct. at 2563 ("[I]mposing an increased sentence under the residual clause of the Armed Career Criminal Act violates the Constitution's guarantee of due process.").

class of defendants" eligible for ACCA's mandatory minimum, it "*effectively w[as]* [an] element[]" of a criminal offense.[30] This is precisely the kind of rule the Court has declared is "normally substantive."[31] Indeed, prior to *Johnson*, *every* court of appeals opinion addressing the question held that decisions narrowing ACCA's scope, such as *Begay v. United States*,[32] and *Chambers v. United States*,[33] were substantive.[34] The rule in *Johnson* is no less substantive because it narrowed ACCA's scope by invalidating the residual clause, as opposed to interpreting its terms. *See* Litman, *Resentencing In The Shadow*, *supra*, at 47 ("It is hard to see how a decision 'interpreting' ACCA's scope would be substantive, but a decision invalidating ACCA's residual clause—which also alters ACCA's scope—would not be. Both kinds of decisions modify the elements of an offense and alter a defendant's eligibility for a 15-year term of imprisonment.").

Accordingly, as a new substantive rule, *Johnson*'s holding is not subject to *Teague*'s retroactivity bar.

C. *The Unlawful Sentences That Resulted From* Johnson *Underscore The Need For Its Retroactive Application*

As a result of *Johnson*, some defendants received—and are currently serving—sentences that exceed the lawful statutory maximum for their offense of conviction. *See supra* Part I.B. This is because *Johnson* did more than invalidate a mandatory minimum sentence. The decision invalidated a

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[30] *See Schriro*, 542 U.S. at 354.

[31] *Id.*

[32] 553 U.S. 137 (2008).

[33] 555 U.S. 122 (2009).

[34] Litman, *Residual Impact*, *supra*, at 63 & n.43 (collecting cases).

statute—ACCA's residual clause—that imposed a mandatory minimum term of imprisonment (15 years) that exceeded the otherwise lawful statutory maximum sentence (10 years) for a defendant's crime. *See* Litman, *Residual Impact*, *supra*, at 61 ("Without the ACCA enhancement, the statutory maximum term of imprisonment for a conviction under § 922(g) is ten years, whereas with the enhancement, the statutory mandatory minimum term of imprisonment is fifteen years."). And declining to apply the rule announced in *Johnson* retroactively would offend fundamental notions of fairness by denying prisoners a remedy for that substantial deprivation of liberty—the mandatory, additional 5-year term of imprisonment that resulted from the application of an unlawful mandatory minimum sentence. Refusing a remedy to these prisoners would also threaten the basic principle that criminal punishment is established by the legislature rather than the judiciary.

Johnson's holding means that every prisoner whose ACCA sentence depended on the residual clause received an unlawfully high sentence.[35] *See* Litman, *Resentencing In The Shadow*, *supra*, at 47 ("*Johnson* therefore means that defendants sentenced under ACCA's residual clause received ... a term of years exceeding the statutory maximum for their offense of conviction."). Applying *Johnson* retroactively would, consistent with basic notions of fairness, ensure that these prisoners have a remedy for the substantial deprivation

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[35] Not all statutory mandatory minimums alter a defendant's statutory maximum sentence. For example, 21 U.S.C. § 841(b)(1)(A) establishes that the statutory maximum sentence for a violation of 21 U.S.C. § 841(a) is life imprisonment, but § 841(b)(1)(A) also imposes a series of mandatory minimum sentences for particular defendants. These mandatory minimums result in additional years of imprisonment, but decisions invalidating these mandatory minimums may not result in defendants receiving sentences that exceed the statutory maximum for their offense of conviction.

of liberty that resulted from the misapplication of ACCA's mandatory minimum sentence—an additional mandatory five-year term of imprisonment. *See* Litman, *Residual Impact*, *supra*, at 61 ("The ACCA enhancement require[d] additional years of imprisonment [which] result[ed] in a real substantive liability.").

Applying *Johnson* retroactively would also recognize the real-world effects of mandatory minimum sentences.[36]

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[36] Even under ordinary circumstances, statutory mandatory minimums are "fundamentally inconsistent" with "a fair, honest, and rational sentencing system." *Harris v. United States*, 536 U.S. 545, 570 (2002) (Breyer, J., concurring); *id.* at 570-71 (mandatory minimums "rarely reflect an effort to achieve sentencing proportionality"). Numerous judges have expressed discomfort with statutory minimum sentences that require judges to impose excessive and unfair terms of imprisonment that do not reflect defendants' culpability or likelihood of reoffending, or serve any other legitimate penological purpose. *See United States v. Acoff*, 634 F.3d 200, 205 (2d Cir. 2011) (Lynch, J., concurring) (lamenting how mandatory minimums "require that courts impose unfair and unreasonable sentences"); *see also* Judge Paul Cassell, Statement on behalf of the Judicial Conference of the United States Before the House Judiciary Subcommittee on Crime, Terrorism, and Homeland Security (June 2007), reprinted in 19 Fed. Sent. R. 344, 344 (2007). Mandatory minimums also undermine sentencing values such as proportionality and uniformity by providing prosecutors with substantial discretion and leverage in plea bargaining negotiations. Robert E. Scott & William J. Stuntz, *Plea Bargaining As Contract*, 101 Yale L.J. 1909, 1962-64 (1992); William J. Stuntz, *Plea Bargaining and Criminal Law's Disappearing Shadow*, 117 Harv. L. Rev. 2548 (2004); *see* United States Sentencing Commission Report to Congress: Mandatory Minimum Penalties in the Federal Criminal Justice System (2011) 136, available at http://www.ussc.gov/sites/default/files/pdf/news/congressional-testimony-and-reports/mandatory-minimum-penalties/20111031-rtc-pdf/Chapter_07.pdf [hereinafter USSC Report, Chapter 7] (noting evidence that suggests mandatory minimum sentences influence plea bargaining decisions). Statutory minimum

See id. The average federal criminal sentence for offenders who receive mandatory minimum sentences is 139 months, whereas the average sentence for offenders who obtain relief from otherwise applicable mandatory minimums is 63 months. Meanwhile, the average sentence for all offenders is 48 months.[37] The substantive effects of mandatory minimums are also disproportionality felt by black and Hispanic offenders.[38]

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sentences "transfer sentencing power to prosecutors, who can determine sentences through the charges they decide to bring and .... reintroduce[] ... sentencing disparity." *Harris*, 536 U.S. at 571 (Breyer, J., concurring); *see also* Speech At The American Bar Association, An Address by Anthony M. Kennedy (Aug. 9, 2003), available at http://www.supremecourt.gov/publicinfo/speeches/viewspeech/sp_08-09-03 ("[F]ederal mandatory minimum statutes ... give[] the decision to an assistant prosecutor."); American Bar Association Justice Kennedy Commission, Reports With Recommendations to the ABA House of Delegates 59 (Aug. 2004), available at http://www.americanbar.org/content/dam/aba/publishing/criminal_justice_section_newsletter/crimjust_kennedy_JusticeKennedyCommissionReportsFinal.authcheckdam.pdf.

[37] USSC Report, Chapter 7, at 136.

[38] Hispanic and black offenders receive mandatory minimum sentences at higher rates than white offenders (38.3% to 31.5% to 27.4%), and black offenders obtain relief from mandatory minimum sentences at lower rates than other offenders (34.9% to 58.9%). United States Sentencing Commission, Quick Facts: Mandatory Minimum Penalties, available at http://www.ussc.gov/sites/default/files/pdf/research-and-publications/quick-facts/Quick_Facts_Mand_Mins_FY14.pdf. ACCA is no exception in this respect. U.S. Sentencing Comm'n, Report to Congress: Mandatory Minimum Penalties in the Federal Criminal Justice System 292 (2011), available at http://www.ussc.gov/sites/default/files/pdf/news/congressional-testimony-and-reports/mandatory-minimum-penalties/20111031-rtc-pdf/Chapter_09.pdf (Hispanic offenders were subject to ACCA's mandatory minimum in 87.1% of cases where offender

The practical realities of mandatory minimum sentences should be reflected in the Court's retroactivity doctrine. The number of mandatory minimums has more than doubled since 1991,[39] and excluding immigration offenses, the percentage of federal prisoners who are convicted under statutes carrying mandatory minimum penalties has increased from 27.8% in 1991 to 39.9% in 2010.[40] An increasing percentage of federal prisoners are also convicted of statutes with mandatory minimum penalties of ten or more years.[41] There is no reason to insulate federal mandatory minimums from otherwise applicable principles of retroactivity.

Because the result of *Johnson* is that some prisoners are serving more than the lawful statutory maximum that Congress authorized for their offense, applying *Johnson* retroactively would also respect the principle that "the power of punishment is vested in the legislative, not in the judicial department." *United States v. Wiltberger*, 18 U.S. (5 Wheat.) 76, 95 (1820). This principle would be implicated in any case about the retroactivity of a decision that changed the requirements for a mandatory minimum sentence. But it is doubly relevant here, where *Johnson*'s holding means that federal prisoners are currently serving terms of imprisonment

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qualified for ACCA, compared to 83.0% for black offenders and 81.6% for white offenders); Sonja B. Starr & M. Marit Rehavi, *Mandatory Sentencing And Racial Disparity: Assessing The Role Of Prosecutors And The Effects of Booker*, 123 Yale L.J. 2, 27-38 (2013).

[39] United States Sentencing Commission Report to Congress: Mandatory Minimum Penalties in the Federal Criminal Justice System (2011) 71, available at http://www.ussc.gov/sites/default/files/pdf/news/congressional-testimony-and-reports/mandatory-minimum-penalties/20111031-rtc-pdf/Chapter_04.pdf.

[40] *Id.* at 82-83.

[41] *Id.* at 75, 83.

that exceed the statutory maximum for their offense because federal courts misapplied ACCA's mandatory minimum sentence. *See United States v. DiFrancesco*, 449 U.S. 117, 139 (1980) ("[A] defendant may not receive a greater sentence than the legislature has authorized.").

II. COMITY AND FINALITY ARGUABLY DO NOT JUSTIFY A BAR AGAINST RETROACTIVE APPLICATION OF *JOHNSON*

Teague noted that "comity and finality must be . . . considered in determining the proper scope of habeas review." 489 U.S. at 308. And these concerns may not justify a bar against the retroactive application of new constitutional rules in collateral challenges to federal sentences. Comity, by definition, "describes the deference one sovereign is to afford the judgments of another." Lee Kovarsky, *AEDPA's Wrecks: Comity, Finality, and Federalism*, 82 Tul. L. Rev. 443, 456 (2007). Accordingly, comity is not implicated where a federal court hears a collateral challenge to a federal sentence being served by a federal defendant in federal prison.[42]

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[42] Finality interests are less weighty in federal collateral challenges to federal judgments than in federal collateral challenges to state judgments for other reasons as well. Unlike federal collateral challenges to state judgments, federal collateral challenges to federal judgments may be the first opportunity for litigants to raise certain constitutional claims. In federal collateral challenges to state judgments, federal courts review claims that have already been raised in at least one state proceeding. In the context of federal judgment challenges, however, federal courts review some claims that have never—and can never—be raised until that point in the litigation. For example, *Massaro v. United States* instructed litigants to raise ineffective-assistance of trial counsel claims in collateral proceedings, rather than on appeal. 538 U.S. 500, 508 (2003). Federal courts also typically do not adjudicate claims that prosecutors have withheld exculpatory evidence in violation of

Nor is the concern for finality significant where a prisoner challenges a sentence, rather than a conviction.[43] As the Court has explained in other contexts, there is a lowered expectation of finality with respect to sentences than with respect to convictions. *See United States v. DiFrancesco*, 449 U.S. 117, 134 (1980) ("Historically, the pronouncement of sentence has never carried the finality that attaches to an acquittal."). Resentencing also does not jeopardize many of the interests that finality serves. Resentencing preserves the finality interests that are associated with a criminal conviction. Resentencing defendants who were wrongfully subjected to mandatory minimum sentences may also improve the accuracy and reliability of sentencing determinations. And resentencing would not expend excessive judicial resources, especially compared to the costs of wrongfully incarcerating prisoners beyond their statutory maximum sentence.

A. Resentencing Preserves The Finality Interests That Are Associated With Convictions

A collateral challenge to a sentence does not disturb any of the finality interests that are associated with a defendant's underlying conviction. Defendants who have been convicted would remain convicted. Resentencing does not jeopardize the expenditure of resources that led to the defendant's conviction. Resentencing also does not remove

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Brady v. Maryland, 373 U.S. 83 (1963), until collateral proceedings, at least where the claim depends on evidence outside the record (which will often be the case). Eve Brensike Primus, *Structural Reform in Criminal Defense: Relocating Ineffective Assistance of Counsel Claims*, 92 Cornell L. Rev. 679, 727 n.226 (2007).

[43] Commentators have maintained that finality concerns vary according to the kind of claim a prisoner raises. *See* Amsterdam, *supra*, at 384; *supra* Part I.A (summarizing *Teague*'s origins).

whatever deterrent effect was achieved through the defendant's conviction. *Cf. Teague*, 489 U.S. at 309 ("Without finality, the criminal law is deprived of much of its deterrent effect.").[44] The traditional arguments for finality thus have much less force in the context of a collateral challenge to a sentence, rather than a conviction.

B. Resentencing Defendants Who Were Wrongfully Subjected To Mandatory Minimum Sentences Can Enhance Sentencing Accuracy and Reliability

Both judicial and scholarly discussions about the finality interests in the criminal justice system have consistently highlighted how concerns about finality are linked to concerns about accuracy and reliability. *See, e.g.*, *Teague*, 489 U.S. at 311-13 (stressing the importance of procedures that are critical to "accurate determination[s]" in defining reach of habeas review); *Stone v. Powell*, 428 U.S. 465, 491 n. 31 (1976) (suggesting that habeas review is most needed to "safeguard against compelling an innocent man to suffer an unconstitutional loss of liberty"); Paul M. Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners*, 76 Harv. L. Rev. 441, 455-60 (1963) (arguing for collateral review where there was a "failure of process" such that a prior determination is unreliable). And where a defendant was wrongfully subjected to a mandatory minimum, resentencing can increase the accuracy and

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[44] Indeed, deterrence and the general willingness of all persons to obey the criminal law may be undermined when people perceive a system as unjust. *See* Jeffrey Fagan & Tracey Meares, *The Paradox of Punishment in Minority Communities*, 6 Ohio St. J. Crim. L. 173, 176-77 (2008). And studies have shown that perceptions of fairness depend on whether defendants are "offered meaningful access to further processes to correct mistakes." Andrew Chongseh Kim, *Beyond Finality: How Making Criminal Judgments Less Final Can Further "Interests Of Finality"*, 2013 Utah L. Rev. 561, 589-90.

reliability of sentencing, in part by allowing for the exercise of judicial discretion.

Resentencings raise fewer concerns than retrials with undermining the accuracy and reliability of the criminal justice system because resentencings, unlike retrials, do not involve a finder of fact re-determining a question of fact that was already resolved one way at the initial proceeding. *See generally* Douglas A. Berman, *Re-Balancing Fitness, Fairness, and Finality for Sentences*, 4 Wake Forest J.L. & Pol'y 151, 166-69 (2004). Trials involve a fact-finder ascertaining what occurred in the past. Sentencing determinations, by contrast, also incorporate some forward-looking assessments. The primary federal statute governing sentencing determinations directs judges to impose sentences based on the need for (future) "deterrence;" the need to "protect the public" from (future) crimes; and the need to "provide the defendant with educational or vocational training, medical care, or other correctional treatment," also with an eye toward the future. 18 U.S.C. § 3553(a)(2)(B)-(D).

Additionally, because sentencing determinations incorporate forward-looking assessments, resentencing proceedings do not encounter the same problems with the "loss of evidence or absence or death of witnesses" that may occur in retrials. Bator, *supra*, at 517. Federal judges must take into account all relevant circumstances that exist at sentencing—including developments that happened after the defendant's commission of the offense—in order to properly discharge their statutory responsibilities. *See Pepper v. United States*, 562 U.S. 476, 492 (2011) ("A court's duty is always to sentence the defendant as he stands before the court on the day of sentencing."). And backward-looking evidence that is relevant to resentencing, such as a defendant's background, will have been preserved in the presentence report that was prepared for the defendant's

initial sentencing. Presentence reports contain information about the defendant's history and background up to the date the report was filed; they are also filed with the court and thus accessible on courts' dockets. *See infra* Part III (discussing requirements of presentence reports).

Moreover, the passage of time may actually increase the accuracy and reliability of sentencing determinations. *See* Berman, *supra*, at 166-69. At resentencing, the sentencing court can take into account additional information that was not available at the previous sentencing, such as the defendant's intervening behavior. *Jones v. State*, 414 Md. 686, 695 (2010). And, as the Court has stressed, "evidence of postsentencing rehabilitation may be highly relevant to several of the § 3553(a) factors that Congress has expressly instructed district courts to consider at sentencing." *Pepper*, 562 U.S. at 491.

Resentencing defendants who were wrongfully subjected to mandatory minimum sentences may also enhance the accuracy and reliability of sentencing determinations by allowing judges to exercise some discretion when imposing sentences. Paul Bator maintained that he could "imagine nothing more subversive of a judge's sense of responsibility, of the inner subjective conscientiousness which is so essential a part of the difficult and subtle art of judging well, than an indiscriminate acceptance of the notion that all the shots will always be called by someone else." Bator, *supra*, at 451. But where, as here, a prisoner was unlawfully subjected to a mandatory minimum sentence, the sentencing judge had no real opportunity to exercise discretion. Statutory mandatory minimums require judges to impose minimum sentences. They do not leave defendants' sentences within the discretion of sentencing courts, and thus do not allow sentencing judges to engage in the "difficult and subtle art of judging well"

what sentence would best effectuate the statutory goals of sentencing. *Id.*

C. Resentencing Does Not Require a Significant Expenditure of Resources

Resentencing imposes relatively few costs, especially compared to retrials. "[T]he cost of correcting a sentencing error is far less than the cost of a retrial." *United States v. Williams*, 399 F.3d 450, 456 (2d Cir. 2005). Sentencing proceedings are governed by significantly fewer rules than trials are.[45] And correcting the misapplication of a mandatory minimum sentence based on a defendant's prior convictions is particularly easy. A federal prisoner may be resentenced by the judge who presided over the prisoner's case and imposed the sentence. *See* 28 U.S.C. § 2255(a). In that proceeding, the judge may rely on prior records—such as the presentence report that categorized the prisoner as an armed career criminal—and adjust the prisoner's sentence accordingly. *See infra* Part III (discussing requirements of presentence reports).

Resentencing prisoners may actually conserve resources, compared to incarcerating those prisoners well beyond the statutory maximum sentence for their offense. ACCA imposed a mandatory minimum sentence of 15 years when the otherwise applicable statutory maximum sentence was 10 years—a difference of at least 5 years for prisoners whose sentences depended on the residual clause. The average cost of incarcerating a prisoner for one month in the United States is $2,500, or $30,000 per year. James J. Stephan, Bureau of Justice Statistics, U.S. Dep't of Justice,

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[45] *See, e.g.*, Alan Michaels, *Trial Rights at Sentencing*, 81 N.C. L. Rev. 1771 (2003); Carissa Byrne Hessick & F. Andrew Hessick, *Recognizing Constitutional Rights At Sentencing*, 99 Cal. L. Rev. 47, 56-73 (2011).

State Prison Expenditures 2001, at 1 (2004). One legal scholar estimated that the average cost of resentencing a prisoner is less than $2,000. *See* Andrew Chongseh Kim, *Beyond Finality: How Making Criminal Judgments Less Final Can Further "Interests Of Finality"*, 2013 Utah L. Rev. 561, 599. In short, any resentencings that would result from the retroactive application of *Johnson* may, on balance, conserve resources—and would not implicate finality concerns generally associated with collateral review.

III. APPLYING *JOHNSON* TO CASES THAT HAVE BECOME FINAL WILL NOT UNDULY BURDEN THE FEDERAL COURTS

The federal criminal justice system has the capacity to effectively conduct resentencings in cases similar to Petitioner's. Applying *Johnson* retroactively will require new sentencings for some of the defendants sentenced under ACCA. The precise number is unclear because only those defendants whose ACCA sentences depended on the residual clause must be resentenced. ACCA imposes a 15-year mandatory minimum sentence if the defendant has three or more convictions for serious drug offenses or violent felonies.[46] *Johnson* invalidated the residual clause, which defined a violent felony to include any crime that "otherwise involves conduct that presents a serious potential risk of physical injury to another."[47] But *Johnson* left intact ACCA's enumerated-offense clause, which lists certain felonies as violent felonies, as well as the element-of-force clause, which defines a violent felony to include a felony that "has as an element the use, attempted use, or threatened use

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[46] 18 U.S.C. § 924(e)(1).

[47] 18 U.S.C. § 924(e)(2)(B)(ii).

of physical force against the person of another."[48] *See* Litman, *Resentencing In Shadow*, *supra*, at 45-46 (explaining argument and collecting cases finding that prisoners did not have *Johnson* claims). The number of defendants whose ACCA sentences depended on the residual clause is substantially fewer than 6,000. Litman, *Residual Impact*, *supra*, at 56 & nn. 6-7 (noting there are just over 6,000 federal prisoners who were sentenced under ACCA); Litman, *Resentencing In Shadow*, *supra*, at 45-46 (collecting cases where courts determined that prisoners sentenced under ACCA did not have *Johnson* claims); *infra* (same).

But not all of these prisoners will require full resentencings. Many prisoners with *Johnson* claims have already served their statutory maximum term of imprisonment. In these cases, courts will merely impose the 10-year statutory maximum term rather than determining a new term of imprisonment with some time still to be served.[49]

Two recent examples of retroactive Guideline amendments also provide a blueprint for how courts may effectively resentence defendants with *Johnson* claims. First, a 2007 Guideline amendment retroactively lowered the base offense level applicable to crack offenses. Federal courts received over 25,000 requests for sentence reductions based on that amendment and granted over 16,000 such requests.[50] "[T]his workload was managed surprisingly well" through

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[48]18 U.S.C. § 924(e)(2)(B).

[49]*See* Leah M. Litman, *The Extraordinary Circumstances Of* Johnson v. United States, 114 Mich. L. Rev. First Impressions 81, 88 & n.53 (2016) (noting several examples); *Lynch v. United States*, No. 03 Crim. 928(RMB), 2015 WL 9450873, at *2-3 (S.D.N.Y Dec. 8, 2015).

[50] Sentencing Guidelines for the United States Courts, 76 Fed. Reg. 41,332, 41,333-34 (July 13, 2011).

several procedures that were instituted by the Bureau of Prisons, courts, prosecutors, and defense attorneys.[51] For example, the Bureau of Prisons agreed to expand prisoner access to legal materials and legal counsel and to make presentence reports more readily available to inmates.[52]

Second, the Sentencing Commission also decided to make the Guideline amendment that implemented the Fair Sentencing Act of 2010 retroactive. When the Commission debated whether to make the amendment retroactive, it received testimony about how prior administrability concerns with retroactive Guideline amendments "have not come to

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[51] Testimony of Judge Reggie B. Walton Presented to the U.S. Sentencing Commission on June 1, 2011 on the Retroactivity of the Crack Cocaine Guideline Amendment, U.S. Sentencing Comm'n (June 1, 2011), at 3, http://www.ussc.gov/Legislative_and_Public_Affairs/Public_Hearings_and_ Meetings/20110601/Testimony_Reggie_Walton.pdf; *see also* e.g., Testimony of James E. Felman on behalf of the Am. Bar Ass'n before the U.S. Sentencing Commission for the Hearing Regarding Retroactivity of Amendments Implementing The Fair Sentencing Act of 2010, U.S. Sentencing Comm'n (June 1, 2011), at 4, http://www.ussc.gov/Legislative_and_Public_Affairs/Public_Hearings_and_ Meetings/20110601/Testimony_ABA_James_Felman.pdf.

[52] Statement of Thomas Kane to the U.S. Sentencing Commission on the Retroactivity of the Crack Cocaine Guideline Amendment (June 1, 2011), at 30-31, http://www.ussc.gov/sites/default/files/pdf/amendment-process/public-hearings-and-meetings/20110601/Hearing_Transcript.pdf; Statement of Thomas R. Kane Presented to the U.S. Sentencing Commission on June 1, 2011 on the Retroactivity of the Crack Cocaine Guideline Amendment, U.S. Sentencing Comm'n (June 1, 2011), at 2-4, http://www.ussc.gov/sites/default/files/pdf/amendment-process/public-hearings-and-meetings/20110601/Testimony_Thomas_Kane.pdf

pass."[53] Federal courts received over 13,000 requests for sentence reductions based on the 2010 Guideline amendment and granted over 7,000 of them.[54] Looking back on both the 2007 and 2010 resentencings, one federal judge surmised that "the Federal Judiciary has effectively managed . [the] retroactivity stemming from guideline amendments."[55]

Similar policies could be instituted here, where the number of prisoners who were sentenced under ACCA is significantly less than the number of prisoners who had potential resentencing claims under the 2007 or 2010 Guideline amendments. The mechanics of resentencings would also be very workable. Presentence reports (PSRs) already include defendants' criminal histories, and thus the essential factfinding has usually been completed. PSRs also

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[53] Testimony of Federal Public Defender Michael S. Nachmanoff before the U.S. Sentencing Commission for the Hearing Regarding Retroactivity of Amendments Implementing The Fair Sentencing Act of 2010, U.S. Sentencing Comm'n (June 1, 2011), at 65, http://www.ussc.gov/sites/default/files/pdf/amendment-process/public-hearings-and-meetings/20110601/Hearing_Transcript.pdf; *see also* Testimony of Judge Reggie B. Walton Presented to the U.S. Sentencing Commission on June 1, 2011 on the Retroactivity of the Crack Cocaine Guideline Amendment, U.S. Sentencing Comm'n (June 1, 2011), at 3, http://www.ussc.gov/Legislative_and_Public_Affairs/Public_Hearings_and_Meetings/20110601/Testimony_Reggie_Walton.pdf.

[54] U.S. Sentencing Commission Final Crack Retroactivity Data Report Fair Sentencing Act tbl.3 (Dec. 2014), http://www.ussc.gov/sites/default/files/pdf/research-and-publications/retroactivity-analyses/fair-sentencing-act/Final_USSC_Crack_Retro_Data_Report_FSA.pdf.

[55] Statement of Hon. Irene Keely, Public Hearing on Proposed Amendments to the Federal Sentencing Guidelines (Nov. 5, 2015), at 30, http://www.ussc.gov/sites/default/files/pdf/amendment-process/public-hearings-and-meetings/20151105/transcript.pdf.

must indicate the offense of conviction and any applicable mandatory minimum sentences, which are both potentially determinative factors at resentencing.[56]

Courts would still need to determine whether a defendant's ACCA sentence depended on the residual clause, but the limited data about the resentencings that have occurred thus far suggests the resentencing process should be both swift and seamless. Readily available materials, such as prior judicial writings and sentencing transcripts, may indicate which ACCA clause a defendant was sentenced under.[57] Courts also sometimes find PSRs sufficient to determine if a defendant's prior convictions qualify as ACCA predicates under the enumerated-offense or element-of-force

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[56] Office of Probation and Pretrial Services, The Presentence Investigation Report, Publication 107 III-32, Appendix E at 12 (Mar. 2006), https://www.fd.org/docs/select-topics---sentencing/the-presentence-investigation-report.pdf?sfvrsn=4 (directing PSRs to indicate applicability of mandatory minimum sentences).

[57] *E.g.*, *United States v. Whindleton*, 797 F.3d 105, 112 (1st Cir. 2015) ("[T]he district court concluded that Whindleton's ADW conviction qualified as a 'violent felony' under the ACCA's so-called 'Force Clause.'"); *United States v. Ozier*, 796 F.3d 597, 599 (6th Cir. 2015) ("At sentencing ... the district court ... concluded that defendant's prior convictions met ... [the] definition of 'burglary.'"); *United States v. Buckley*, No. 11-cr-82-wmc, 2015 WL 6443145, at *2 (W.D. Wisc. Oct. 22, 2015) ("[U]pholding the sentence on direct appeal, the Seventh Circuit ... found the ... statute .... requires as an element that force be directed against another."); *United States v. Dixon*, No. 2:12-cr-222-GMN-VCF, 2015 WL 5691215, at *2 (D. Nev. Sept. 28, 2015) (citing transcript as evidence that residual clause was "the basis" for defendant's ACCA sentence); *Jordan v. Butler*, No. 6:15-133-KKC, 2015 WL 5612274, at *3 (E.D. Ky. Sept. 23, 2015) ("[T]he trial court noted that Johnson's Tennessee conviction ... constituted a 'violent felony' because 'burglary' is one of the four enumerated offenses.").

clause.[58] A significant body of case law already spells out which offenses qualify as ACCA predicates under the enumerated-offense and element-of-force clauses, and courts have relied on these cases to quickly dispose of potential resentencing claims based on *Johnson*.[59] The United States'

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[58] *E.g.*, *Johnson v. United States*, No. 15-2214, 2015 WL 7274022, at *3 (C.D. Ill. Nov. 16, 2015); *Harris v. United States*, No. 1:15-CV-8016-LSC, 2015 WL 7075287, at *2 (N.D. Ala. Nov. 13, 2015); *Jackson v. United States*, No. 1:15CV00115, 2015 WL 6750807, at *18-19 (E.D. Mo. Nov. 5, 2015); *United States v. Hill*, No. 1:12-cr-0243, 2015 WL 6560632, at *7 (M.D. Pa. Oct. 29, 2015); *Brown v. United States*, No. 4:15-cv-646, 2015 WL 6125721, at *2 (N.D. Tex. Oct. 15, 2015); *Jackson v. United States*, No. CV 115-081, 2015 WL 5467957, at *3 (S.D. Ga. Sept. 17, 2015); *United States v. Broxton*, No. 5:12cr5, 2015 WL 5819662, at *2 (N.D. Fla. Aug. 27, 2015).

[59] *E.g.*, *United States v. Alexander*, 809 F.3d 1029, 1032 (8th Cir. 2016) (citing prior case holding conviction qualified as ACCA predicate under clause other than the residual clause); *United States v. Jean*, No. 15-11978, __ F. App'x __, 2016 WL 143361, at *3 (11th Cir. Jan. 13, 2016) (same); *United States v. Whindleton*, 797 F.3d 105, 112 (1st Cir. 2015) (same); *United States v. Hill*, 799 F.3d 1318, 1322-23 (11th Cir. 2015) (same); *United States v. Priddy*, 808 F.3d 676, 684 (6th Cir. 2015) (same); *United States v. Kemmerling*, 612 F. App'x 373, 376 (6th Cir. 2015) (same); *Brooks v. United States*, No. 3:12-cv-1266, 2016 WL 99485, at *18 (M.D. Fla. Jan. 8, 2016) (same); *Locklear v. United States*, No. 7:11-CR-00067, 2015 WL 9200439, at *2 (E.D. N.C. Dec. 16, 2015) (same); *United States v. Williams*, No. 3:04-cr-193, 2015 WL 9582828, at *3 (N.D. Tex. Dec. 1, 2015) (same); *Hairston v. United States*, No. 1:11CR313-1, 2015 WL 6553895, at *2 (M.D. N.C. Oct. 29, 2015); *Bohannon v. United States*, No. 13-1255, 2015 WL 6036614, at *4 (W.D. Tenn. Oct. 15, 2015) (same); *Pringle v. United States*, No. 3:15-cv-1455, 2015 WL 7566263, at *3 (N.D. Tex. Oct. 5, 2015) (same); *Thompson v. United States*, No. 1:12CV715, 2015 WL 5541326, at *4 (M.D. N.C. Sept. 18, 2015); *Lockhart v. United States*, __ F. Supp. 3d __, 2015 WL 5008607, at *3 (M.D. Fla. Aug. 20, 2015) (same); *Logan v. United States*, No. 1:12CV699, 2015 WL 5098613, at *1 (M.D. N.C. July 28, 2015) (same); *United States v. Nelson*, __ F.3d __, 2015 WL

filings have also helped to determine which defendants were sentenced under ACCA's residual clause, as well as which prior convictions still qualify as ACCA predicates.[60] There will also be few, if any, other disputes to resolve at resentencing because the United States is waiving procedural objections to resentencing prisoners whose ACCA sentences depended on the residual clause.[61]

CONCLUSION

The Court should rule that the rule in *Johnson* is substantive and retroactively applicable. Accordingly, the Eleventh Circuit's denial of a certificate of appealability should be reversed.

9583914, at *1 (11th Cir. Dec. 30, 2015) (citing prior case holding that conviction did not qualify as ACCA predicate under other ACCA provisions); *Watkins v. United States*, No. 1:15-CV-352-CLC, 2015 WL 9587712, at *3 (E.D. Tenn. Dec. 30, 2015) (same); *Carthorne v. United States*, No. 1:10CR96-1, 2015 WL 7430040, at *1 (M.D. N.C. Nov. 20, 2015) (same).

[60] *United States v. Cummings*, __ F. App'x __, 2016 WL 43762, at *1 (11th Cir. 2016) (per curiam) ("The government agrees that … [the predicate conviction] does not have 'as an element the use …. of physical force."); *United States v. Cook*, 624 F. App'x 723, at *1 (11th Cir. Dec. 3, 2015) (per curiam); *United States v. Dowlen*, 616 F. App'x 209, 210 & n.1 (6th Cir. Oct. 1, 2015) (per curiam) ("Dowlen's 2004 conviction for second-degree burglary no longer qualifies as an ACCA predicate offense, as the government concedes.").

[61] Litman, *Extraordinary Circumstances*, *supra*, at 88-89 & n.55 (providing examples); Leah Litman, *Circuit Splits & Original Writs*, Casetext (Dec. 17, 2015), available at https://casetext.com/posts/circuit-splits-original-writs (same).

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